1-24-1991

Re Canada Post Corp and CUPW (Burke)

Innis Christie
Dalhousie University Schulich School of Law

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS (The Union)

AND:

CANADA POST CORPORATION (The Employer)

RE: Burke, T. (The Grievor)
C.U.P.W. Grievance No. 126-87-00135
C.P.C. Arbitration No. 38988A

BEFORE: Innis Christie, Arbitrator

At: Halifax, Nova Scotia and St. John's, Newfoundland

Hearing Dates: July 18, August 20-23 and October 22 and 23, 1990

For the Union:
Kimberley Turner - Counsel
Ronald A. Pink - Counsel
Fred Furlong - C.U.P.W. Regional Representative
Randy Constantine - President, C.U.P.W. St. John's Local

For the Employer:
Brian Johnston - Counsel
Ann Barrett - Legal Assistant
John Crook - Labour Relations Officer

Date of Decision: January 24, 1991

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Union grievance alleging breach of the Collective Agreement between the parties in respect of the Postal Operations Group (Non-supervisory): Internal Mail Processing and Complementary Postal Services, which expired July 31, 1989 and remains in force pursuant to the Canada Labour Code, and in particular of Article 10, in that the Employer discharged the grievor without just, reasonable or sufficient cause. The Union requests that the grievor be reinstated and reimbursed for any lost rights, benefits or earnings, and that all reports, letters and documents relating to this matter be removed from his personal file.

At the outset of the hearings in this matter the parties agreed that I am properly seized of it, and that I should remain seized after the issuing of this award to deal with any matters arising in its application, including the quantum of any compensation which might be ordered to be paid.

AWARD

By letter dated January 27, 1988, and delivered to the grievor the following day, he was advised that he was indefinitely suspended from duty without pay effective 1400 hrs January 27 pending further investigation of criminal activities at the St. John's mail processing plant. By further letter dated February 8, 1988 and delivered to the grievor that day he was given notice that he was discharged effective February 8, 1988 for having been involved "in major acts of misconduct in violation of the Canada Post Corporation Act, which is also a criminal offence". On July

28, 1988 the Union requested that arbitration proceedings in this matter be delayed until the disposition of criminal charges against the grievor. He was acquitted May 30, 1990. On June 19 the Corporation got notice from the Union that arbitration would proceed on July 18 and 19.

The grievance in this matter was filed on February 18, 1988 and received by Canada Post on February 22nd. It provides:

> The Union grieves on behalf of Tom Burke that the employer has violated the CUPW Collective Agreement and in particular article 10. By letter dated February 8, 1988, Tom Burke was discharged from his employment with Canada Post Corporation without just, reasonable or sufficient cause.
>
> Corrective Action Requested
> That the Canada Post Corporation grant Tom Burke full redress and reinstate him with his position with the Canada Post Corporation and compensate him for all list rights, benefits, and earnings and that all reports, letters or documents relating to this matter be removed from his personal file.

At the outset of the first day of the hearings in this matter, counsel for the Employer requested that I adjourn, mainly on the basis of the unavailability of Ron Fleming, Chief of Security and Investigation of the St. John's Mail Processing Plant, who, according to him was to be a key witness. Counsel for the Union, Mr. Pink, argued that I should proceed to deal at least with two preliminary issues, one relating to the timeliness and adequacy of the Employer's letters of January 27 and February 8 under Article 10.02 of the Collective Agreement and the other relating to the

admissibility in evidence of certain videotapes, which, he alleged, should be excluded by Article 41.02.

Counsel for the Employer satisfied me that Mr. Fleming's testimony would be highly relevant to the second preliminary matter and that the Employer had been disadvantaged by the slowness with which the Newfoundland Supreme Court returned to it items of evidence used in the grievor's criminal trial. Mr. Fleming's absence had, apparently, exacerbated the latter difficulty. In any event, I ruled that both preliminary matters should be dealt with in the course of several days of hearings which were then agreed to be held in St. John's commencing on August 20.

When the hearings reconvened in St. John's, after hearing submissions by both counsel and considering the convenience of certain witnesses, I ruled that the issue of the admissibility of the videotape evidence should be dealt with first and that evidence and arguments relating to the Union's objection based on article 10.02 should be dealt with in conjunction with the evidence and argument on the merits. Most of the first two days of hearings in St. John's were taken up with the issue of the admissibility of the videotape, and I gave the parties my oral ruling on that issue several hours after adjournment on the second day. My conclusion was that the videotape in question was not admissible.

The remainder of this award is organized to reflect the order of proceeding I have just described. I set out first the evidence, issues and reasons relevant to my refusal to admit the videotape

evidence. I then outline the facts as I have found them relating to the merits of the allegation by the Union that the grievor was discharged without just, reasonable or sufficient cause and to the Union's objection under article 10.02 of the Collective Agreement. After stating the issues, I give my reasons for rejecting in part the Union's 10.02 objection and for my conclusion on the merits, which is that the Employer has not discharged the onus upon it of proving just cause for discharge. I then turn to the subsidiary issues of whether the grievor's behavior warrants the substitution of any lesser discipline and the Employer's submission that even in the absence of just cause for discharge the grievor should not be reinstated. I have rejected that submission and have ordered that the grievor should be reinstated immediately. Compensation is to be determined by the parties, failing which I will reconvene and hear evidence and argument on that issue.

ADMISSIBILITY OF THE VIDEOTAPE EVIDENCE

For some two weeks preceding January 27, 1988, the day the grievor was arrested, his activities and those of two other employees who worked with him had been videotaped. All three were suspected of criminal activities based on management's analysis of the incidence of damage to the mails. The cameras used to do this had been secretly installed in the St. John's Mail Processing Plant, where they could capture the activities of employees working

on the catwalk where sortation was carried out in the City Parcel Post section on the 11.00 a.m. to 7.00 p.m. shift.

The equipment consisted of two cameras temporarily installed among the ceiling girders and vents and hardwired to monitors and taping equipment in an otherwise unused room. The cameras were left turned on throughout the period but the monitors were observed and the taping devices turned on only when the grievor and his two fellow employees were in the parcel sortation area. The equipment was provided by the Employer's Security and Investigations Branch at its head office and installed by members of the RCMP and the Royal Newfoundland Constabulary, working with Mr. Fleming, the Employer's Chief of S and I at the St. John's plant, and people from the Employer's headquarters.

With the videotape in evidence the grievor was acquitted of a charge which read as follows:

> Between the 18th day of January, A.D., 1988 and the 27th day of January, A.D., 1988 at St. John's Mail Processing Plant situate at 98 Kenmount Road, City of St. John's, in the Province of Newfoundland, did while employed and on duty as a Canada Post employee, without express authority by or under the Canada Post Corporation Act or the Customs Act, knowingly keep, delay or detain mail, thereby committing an indictable offence, contrary to Section 42.5(a) of the Canada Post Corporation Act, Chapter 54 of the Statutes of Canada, 1980-81 as amended.

The employee's two workmates, Ghaney and Vincent, pled guilty to similar charges. They were also discharged and neither grieved.

Counsel for the Union objected to the admissibility of the videotaped evidence on the basis of article 41.02(b) of the Collective Agreement, which provides:

> (b) Notwithstanding paragraph (a), no closed circuit television system shall be used directly or indirectly to watch employees inside a postal installation. Any such investigative system already existing shall be dismantled within sixty (60) days after the coming into effect of this agreement. No evidence gathered in violation of this paragraph shall be admissible before an arbitrator.

As I have already stated, at the end of the second day of hearings in St. John's, I ruled that this provision of the Collective Agreement precluded the admission of the videotape evidence in question. In my opinion article 41.02(b) is clear on its face and left me no choice in the matter.

Counsel for the Employer argued vigorously that the equipment in issue here was not a "closed circuit television system" as intended by the parties when they agreed to article 41.02(b), partly at least because it was a temporary installation. I will turn shortly to the evidence of negotiating history and past practice upon which he relied in making this submission, but I must say first, and as the primary basis for my application of article 41.02(b), that I see no real ambiguity in this phrase as it applies to the equipment used in this case. There is no dispute that the cameras were what is commonly referred to as television cameras and that they were hardwired to a television monitor. It was not seriously contended that the videotape was not at

least an indirect, if not a direct, use of this system, which was used to watch the grievor. I note that two of the Employer's witnesses who testified on this aspect of the case acknowledged in cross-examination that this equipment was what is commonly referred to as closed-circuit television.

There is a long history between these parties of dispute over the use of closed-circuit television monitoring. For the purposes of this case I am prepared to accept that the main concern of the Union through the 1970's was the use of closed circuit television to monitor work performance and that the Union's principal appeals to conciliators in the course of collective bargaining were not directed to precluding its use in the investigation of criminal activities. I also acknowledge the point made by counsel for the Employer, that the second sentence in article 41.02(b) might suggest a focus on permanently installed rather than temporary systems. Nevertheless, even if I assume that there is some ambiguity in article 41.02(b), on the basis of the negotiating history introduced in evidence I must conclude that, on balance, it supports the meaning put forward by counsel for the Union. Certainly, the evidence does not suggest any mutual understanding and interpretation of this provision in accordance with the strained interpretation advocated by counsel for the Employer.

The first witness called by the Employer, Mr. Mike Hennessey, had been Program Manager with National Mail Operations and in the 1984-85 round, when article 41.02(b) was introduced into the

Collective Agreement, was involved in preparing for collective bargaining at the national level. He was able to testify only that the Union's concern had been with the dehumanizing affect of general surveillance. Mr. Hennessey left the bargaining team before bargaining commenced in earnest. Mr. Al Whitsun, Director of Special Investigations and Projects in the Employer's Security and Investigation Service, was involved in the 1984 negotiations in only a very limited way. He provided the bargaining team with expert advice on the very complex system of surveillance then in place in Toronto's Gateway postal facility.

Far more convincing was the testimony of Peter Whittaker, a member of the Union bargaining team in the negotiations which led up to the initial inclusion of article 41.02(b). He took notes of those negotiations on behalf of the Union. Mr. Whittaker's testimony and notes are quite convincing to the effect that in that round of negotiations the Union did not want to accept "temporary CCTV as well as being opposed to the large systems". His testimony, notes and evidence of written proposals put in by the parties in those negotiations indicate that at the end the Union's proposal for what became article 41.02(b) was adopted, with only very minor changes and on the understanding that closed circuit television cameras could be used for surveillance of the Employer's vaults and other than inside postal installations.

Assuming again for the moment that article 41.02(b) is to some degree ambiguous, I will briefly address evidence of practice

testified to by the Employer's witnesses suggesting that this provision was not intended to apply to temporary installations for investigating criminal activity. Specifically, reference was made to the arbitration award of arbitrator Jasmin in the matter of Croteau (Nov. 3, 1988) C.U.P.W. Grievance Nos. 100-H-1573 and 18383, C.P.C. Arbitration Nos. 87-1-3-111723 and 115194. Arbitrator Jasmin acted on the basis of the testimony of witnesses who had observed the grievor in that case on a closed circuit television monitor. Indeed he suggested that "the evidence would have been more complete if the events detected by the closed circuit television had been recorded on video". (At p. 15) Like this case, Croteau involved an investigation conducted by the Employer in conjunction with the police. In that case a theft was involved. I have taken Croteau very seriously, but I am struck by the fact that there was, apparently, no objection by the Union on behalf of the grievor in that case to the use of closed circuit television.

Closed circuit television and videotape was also used in the matter of Pownall (October 23, 1989), C.U.P.W. Grievance Nos. 50101-GL-005 and 009; C.P.C. Arbitration Nos. 245404W and 245020W. However, that award by arbitrator Norman is not really relevant, because while it involved C.U.P.W. it arose under the GL agreement, which contains no equivalent of article 41.02(b).

Mr. Al Whitsun testified that since 1984 there have been some fourteen instances in which closed circuit television has been

used to conduct surveillance of C.U.P.W. members suspected of criminal activity with respect to the mails. He spoke specifically of a case in the Lewisport postal installation within the last year and a half, where an employee who had been the subject of surveillance in that sort of context was dismissed and did not grieve. He noted also that the grievor's two fellow employees, Ghaney and Vincent, had not grieved their dismissals. He also put in evidence excerpts from the Winnipeg Free Press for May 25th, 1989 with respect to the criminal trial of a Canada Post employee named Duelas who had been convicted on the basis of videotape evidence and sent to jail for theft from the mails.

I am unable to conclude from this evidence that article 41.02(b) was intended by the parties, as counsel for the Employer contended, to allow the use of closed circuit television to watch employees inside a postal installation provided the closed circuit television system was temporary and was being used to investigate criminal activities in respect to the mails. Presumably the Union knew of the use of such systems in each of the cases testified to where the evidence was actually used in court, but where the employees were found guilty the Union may have had a variety of reasons for not encouraging a grievance. Indeed, the employees themselves may not have wished to grieve their discharges. These cases therefore simply do not assist me in giving article 41.02(b) the interpretation argued for by counsel for the Employer. In the instances where cameras were installed and nothing came of it I

assume the union did not even know they had been used, so that does not constitute past practice of any relevance to the interpretative exercise.

Finally, it was not argued before me nor will I undertake any discussion of what the position of Canada Post would be if the police insisted on using closed circuit television in a criminal investigation despite the Employer's objection. Clearly the Collective Agreement does not govern what evidence is admissible in a criminal trial.

In summary on this issue, I rule that the clear words of article 41.02(b) precluded me from admitting evidence gathered by the use, directly or indirectly of a closed circuit television system, and that the videotaped evidence here in question was such evidence. Even if I were to assume there is some latent ambiguity in the words of the provision, neither the evidence of negotiating history nor the evidence of past practice before me satisfies me that article 41.02(b) should be given any different interpretation in these circumstances.

THE MERITS, AND THE PRELIMINARY OBJECTION BY THE UNION BASED ON ARTICLE 10.02

THE FACTS: The grievor is a 36 year old man with Grade XI and one year of university education. He is married with two children aged eight and six years. He commenced his employment with Canada Post in January of 1977 as a casual and after ten months he became

a part-time employee, obtaining full time employment in April of 1979. When he was discharged he was a PO4 working on the midnight shift in the City Parcel Post section of the St. John's Mail Processing Plant. He had been doing that job for four or five years. Through the whole of that time he had worked with Roger Vincent and for the last year or two he had worked with Wayne Ghaney. There were no negatives in the grievor's personal file which, of course, discloses discipline only over the previous twelve months. Additionally, witnesses called by the Employer testified without contradiction that the grievor was a solid, steady person and a worker who simply wanted to do his job.

The most relevant part of the grievor's job involved working on a catwalk above the main floor of the Mail Processing plant. Parcels are sent up by a belt system to the catwalk, where two or three employees standing side by side sort the parcels by taking them off the "table" part of the conveyor belt and tossing them into sixteen different chutes, which the parcels slide down into binnies. Eight of the chutes are in front of the employees as they face the table and eight are behind them, so that part of the sortation manoeuvre involves turning around to toss the parcel into the appropriate chute, although an experienced worker often virtually tosses a parcel over his shoulder into the appropriate chute.

There was some dispute over whether activities on the catwalk could have been observed from the plant floor. It was clear to me

from taking a view of the work situation that the floor of the catwalk area could not have been observed from the plant floor although the heads of the people working there could have been. Depending on the arrangement of other equipment, somebody standing on the floor looking straight up the final portion of the entry stairway might well have been able to see more than the heads of the people working there, particularly of the person nearest the stairway, but would not have been able to see the floor. From any vantage point on the floor it would have been impossible to see the handling of parcels on the "work table" portion of the conveyor belt itself.

Parcels arrive at the sortation area in a monotainer. The grievor and his fellow workers would then put them on the belt up to the sortation area. They would first cull out undersized, oversized and fragile parcels and special delivery, C.O.D., priority and forward parcels. In addition, damaged parcels would be culled out and put aside for repair at the repair table in the immediate area.

Some of the binnies into which parcels were sorted were emptied by delivery van drivers and others were emptied by the grievor and his fellow workers, who either tied the parcels out in bags or loaded them on a C-21 trailer.

While other combinations were possible, normally the grievor and both of his workmates worked together on the floor level, either putting parcels on the belt or emptying the bins, or sort-

ing on the catwalk. It was also quite common for one person to sort on the catwalk while the other two worked down at the floor level.

Parcels were sometimes damaged on the belt up to the catwalk. They were culled out and repaired there if a tape gun was at hand and not too much work was required or they were carried down to the repair table at a convenient time. Parcels were also damaged as they went down the chutes into the binnies, and they too were either repaired on the spot or placed on the repair table. The normal method of repair was, as I have already said, to use a tape gun if that was sufficient. Otherwise damaged parcels were enclosed in plastic. If a damaged parcel had spilled its contents to any degree it was appropriate for an employee working on sortation to put the parcel back together again if that was possible and make the appropriate repairs, or to leave the contents on the repair table. All such material was, of course, "mail" and if it could not be put back into a repairable parcel it was to be sent to the Undeliverable Mail Office.

At the end of the shift the grievor and his fellow workers were to repair the damaged parcels culled out in the course of the shift. If they could not complete that work it was done by a day shift employee.

I note that the grievor, Wayne Ghaney and Roger Vincent worked the 11.00 to 7.00 shift except that they worked from 9.00 to 5.00 on Mondays, and on the day shift one other day.

Andy O'Brien, who was Plant Manager at the time, testified that in the autumn preceding the arrest of the grievor, Ghaney and Vincent on January 27, 1988 he had become seriously concerned about the number of complaints of damaged parcels and missing articles. Indeed, he testified that his management staff had voiced sufficiently serious concerns that he had written a memo to Ron Fleming, his Security and Investigation Officer. He testified that after Christmas Mr. Fleming told him that a major investigation was underway.

According to Ron Fleming, as a Postal Inspector in the Security and Investigations section he reports to his superiors in that section, in Ottawa, and not to the Plant Manager in St. John's. Thus the closed circuit television surveillance and other aspects of the investigation which he conducted were not, he said, reported to Mr. O'Brien. He used a commissionaire to assist with watching the monitor and then brought another person in from the S and I division from New Brunswick to assist, so that neither Operations nor Labour Relations managerial personnel in the St. John's plant had any role in the investigation. Mr. Fleming said he dealt directly with members of the Royal Newfoundland Constabulary, and with the RCMP, who assisted on a technical side.

On January 27th, Mr. Fleming said, he called in the police and played the videotape to them. He testified that they then decided from the viewing that offences had occurred and that they would arrest the grievor, Ghaney and Vincent.

The Union's objection based on article 10.02 of the Collective Agreement to some, or perhaps to all, of the evidence relied on by the Employer make important both the timing and particulars of the documents and other communications by the Employer to the grievor on the 27th and in the following weeks. The Union's position, also based on Article 10.02, that the grounds upon which the Employer must justify the grievor's discharge are more limited than they are the in Employer's submission also makes the timing and particulars of these communications important.

The grievor testified that about 2.00 p.m. on January 27 Mr. Fleming came up to him and said that there were two men there to speak to him. Mr. Fleming did not give him any document or tell him what the problem was. The two men turned out to be non-uniformed police. They read the grievor his rights and said he was charged under the Canada Post Act and was to be taken to the police station.

When the grievor arrived at the police station he saw no one from the Post Office. He spent the night in jail and nobody told him any specifics of what he was alleged to have done until the following charge was read in court on January 28th:

> **Between the 18th day of JANUARY, A.D., 1988 and the 27th day of JANUARY, A.D., 1988, at or near St. John's, in the Province of Newfoundland, did without express authority by or under the Canada Post Corporation or the Customs Act, knowingly open, keep, delay, or detain, or permit to be opened kept, delayed, or detained mail, thereby committing an indictable offence, contrary to Section 42-54(a) of the Canada Post Corporation Act, Chapter 54 of**

> the Statutes of Canada, 1980-81-82-83 as Amended...

It is to be noted that the words of this charge, which appear on the sworn information entered in evidence before me, differ from the words of the charge upon which the grievor was eventually tried and acquitted. In particular, the charge read on January 28th alleged that the grievor did "knowingly open, [k]ep, delay, or detain, or permit to be opened kept, delayed, or [d]etained mail, thereby committing an indictable offence . . ." whereas the charge upon which he was tried was that he did "knowingly keep, delay or detain mail, thereby committing an indictable offence . . .", with nothing about permitting.

On the evening of January 28th an official of the Employer delivered a letter to the grievor at his house advising him that he was indefinitely suspended. It read:

> January 27, 19[illegible]
>
> Mr. T. Burke
> P.O.4
> St. John's, MPP
> A1B 3R0
>
> **Re: Indefinite Suspension**
>
> **You are hereby advised that you are indefinitely suspended from duty, without pay, effective 1400 hrs, January 27, 1988 pending further investigation into your criminal activities within the St. John's Mail Processing Plant.**
>
> **On January 27, 1988 at approximately 1400 hrs you were arrested by the Royal Newfoundland Constabulary for damaging, tampering and theft of mail.**

> You will be notified later as to what disciplinary action will follow after the investigation has been completed.
>
> A copy of this letter will be placed on your personal file.

Andy O'Brien, the Plant Manager, testified that he first became aware of the grievor's arrest when Ron Fleming came to his office on January 27th and said that the Royal Newfoundland Constabulary had arrested the grievor, Ghaney and Vincent. At that point, Mr. O'Brien testified, he drafted the letter of suspension.

Mr. O'Brien's next relevant action in this matter was to prepare and have served on the grievor on February 2 the following Notice of Disciplinary Interview:

> 02 February 1988
>
> T. Burke
> 252 Portugal Cove Road
> St. John's, NF
> A1B 2N6
>
> **RE: NOTICE OF DISCIPLINARY INTERVIEW**
>
> You are required to attend a disciplinary interview on **February 3, 1988**, in the Conference Room of the St. John's MPP, 98 Kenmount Road at **1600 hrs**.
>
> The purpose of the interview is to provide you the opportunity to respond to the following charge:
>
> Damaging, Tampering and Theft of Mail
>
> In accordance with the Collective Agreement, you have the right to have a Union Representative present at this interview.
>
> A copy of this letter will be placed on your personal file.

Sometime on February 3rd Mr. O'Brien received a call from Theresa Walsh, President of the St. John's local of the Union asking for a twenty-four hour delay in the disciplinary interview because the grievor's legal counsel was not available. In fact, the interview was delayed for forty-eight hours, but there is no evidence of the reason for that delay, other than Mr. O'Brien's testimony that he could not recall any discussion with the Union with respect to doing the interview on the 5th. The Management Report on that interview was put in evidence and its contents were not disputed:

DISCIPLINARY INTERVIEW
NARRATIVE REPORT
FEBRUARY 5, 1988

In Attendance:

UNION	**MANAGEMENT**
R. Earle (Lawyer)	**A. O'Brien**
T. Burke	**F. Connors**
T. Walsh	

Mr. Earle: The Union Lawyer, Mr. Earle, stated that as charges have been laid under the Canada Post Corporation Act and management representatives could be subpoenaed, the employee is advised not to respond.

Mr. O'Brien: The purpose of this interview is to give you the opportunity to respond to the following:

During the past couple of weeks an investigation was conducted at the Plant by Security & Investigations and the Royal Newfoundland Constabulary in response to complaints of damaged, tampering with, and/or stolen items and/or parcels at the St. John's, MPP.

We were advised on January 27, 1988 that during the course of their investigation you were observed

intentionally damaging parcels, tampering with and opening parcels and other mail, contents were extracted, looked at, read in certain cases, damaged, and items opened and contents stolen.

Mr. Earle: The Union Lawyer asked for specific dates when each infraction occurred.

Mr. O'Brien: All infractions occurred during the past couple of weeks. When questioned for a more specific period, it was stated that between the period of January 15-27, 1988.

Mr. Earle: Lacking specifics or details the employee couldn't possibly answer the charges.

Mr. O'Brien: The response expected from Mr. Burke is that he did or did not commit the alleged acts during the period stated.

Mr. Earle: No possible answer can be derived from such general statements.

Mr. Earle: Asked that everyone present except Mr. Burke leave the room so that he could speak to his client in private.

RECESS 2 MINUTES

Mr. Earle: Mr. Burke will not be giving a response for reasons previously stated and that no specific times or dates have been provided.

Mr. O'Brien: Could not Mr. Burke give a response to his activities during the two week period prior to January 27, 1988.

Mr. Earle: No

Finally, on February 8th, the grievor was discharged by delivery to him of the following letter:

98 Kenmount Road
St. John's, NF
A1B 3T3

08 February 1988

Mr. T. Burke
252 Portugal Cove Road
St. John's, NF
A1B 2N6

Re: Damaging, Tampering and Theft of Mail

On January 27, 1988 you were given a notice of indefinite suspension as a result of an investigation which determined that you were involved in criminal activities under the Canada Post Corporation Act.

During the period of the investigation you were observed in the act of intentionally damaging parcels, tampering with and theft of items from the mail.

At the disciplinary interview, on the advice of your lawyer, you refused to respond or discuss the charges against you.

In view of the above we must make our decision based on information provided by Security & Investigations and the Royal Newfoundland Constabulary. From their report it is quite obvious that you have been involved in major acts of misconduct in violation of the Canada Post Corporation Act, which is also a criminal offense.

You are hereby notified that you are discharged from Canada Post Corporation, effective 08 February 1988. You are not permitted to enter the work area of any premises occupied by Canada Post Corporation. You are not to use any identification which would associate you with Canada Post Corporation. You will be advised by our Pay Office regarding salary and/or benefits, if any, to which you are entitled.

A.W. O'Brien
Plant Manager
St. John's, MPP

It is undisputed that each of these documents was placed on the grievor's personal file as soon as it was produced.

Mr. O'Brien testified that when he wrote the letter of indefinite suspension dated January 27 he knew nothing more about the charges against the grievor than he had been told by Mr. Fleming and knew none of the specifics of what had happened. Even when he conducted the interview of February 5th, Mr. O'Brien testified, all he knew was that there was some sort of a "set up package" involved and that three employees had been involved. Then on February 7, or possibly before he wrote the discharge letter on February 8th, Mr. O'Brien learned through a verbal report from Mr. Fleming and Mr. Hennessey some of the specifics of goods removed from what I shall later refer to as "the Caines parcel".

Mr. O'Brien testified to the fact that when the grievor was first employed in 1977 he signed a document entitled "INTERFERENCE AND TAMPERING WITH MAIL FORBIDDEN" and that document, bearing the grievor's signature and dated November 29, 1977, was introduced into evidence. The parts of that document which might be considered relevant are the following:

> **INTERFERENCE AND TAMPERING WITH MAIL FORBIDDEN**
>
> 2. Forbidden
>
> Employees are forbidden under any circumstances to tamper with, or to place, carry or have in their pockets, clothing, or personal equipment, any article of mail which is in the course of post, no matter to whom it is addressed.
>
> 3. Excuses Not Acceptable

Frequently, employees after having been apprehended for placing mail on their person, or secreting mail, offer excuses such as that they were unaware that they were doing wrong or, that they were merely intending to verify the postage or addressing, etc, at a more convenient time.

All Employees are to be warned that these or other similar excuses shall be considered as unacceptable under any circumstances.

4. Indictable Offence

In order to emphasize the seriousness of such acts, all concerned are reminded of the following provisions of the Post Office Act and Criminal Code relating thereto:

(1) Every person who unlawfully opens or wilfully keeps, secrets, delays or detains or suffers to be unlawfully opened, kept, secreted or detained any article of mail is guilty of an indictable offence.

. . .

7. Discipline

Any employee who contravenes or fails to observe any provision of this Directive is guilty of misconduct and may be liable to immediate dismissal or to such other disciplinary action as may be determined by Postal Authorities without prejudice to the taking of such legal action as the circumstances of the case may warrant.

The preliminary proceedings in respect to the grievor were spread over a considerable period, totalling in his estimation three to five days. His main trial, he testified, lasted fourteen days. Ghaney and Vincent pleaded guilty and testified on behalf of the prosecution. They were each fined approximately seven hundred dollars and sentenced to ten days in jail. As I have already stated, the grievor was acquitted. He testified that his

legal fees cost approximately ten thousand dollars. Since his discharge he has done a plumbing course and has had some related work but has been for the most part unemployed.

Without the videotape to rely on, counsel for the Employer faced a considerable challenge in proving the misconduct for which the grievor was discharged. To do so he called as witnesses under subpoena the grievor himself, Roger Vincent and Wayne Ghaney. He also subpoenaed another former co-worker of the grievor, David Francis. Mr. Francis worked on City Parcel Post Sortation with the grievor and Roger Vincent during November 1987 and for the first week or two of December 1987, while Wayne Ghaney was ill.

During that period David Francis approached a supervisor several times asking to be transferred. He was so concerned with "what was going on" in City Parcel Post Sortation that he said to the supervisor, as he quoted himself in his testimony, "take me the Jesus out of here!". Finally he insisted that if he were not transferred he would have to quit. Mr. Francis never told the supervisor why he wanted to be transferred. Indeed he never told anyone (other than his father, who was himself a postal worker) until he told John Crook, a Labour Relations Officer with the Employer working on this arbitration, on August 16, 1990, two days before he gave his evidence. It seems the Employer, faced with the likelihood of not being able to rely on its videotape evidence, had in some way become aware of the possibility that Francis might have relevant evidence.

I note in passing that in the first week of January, 1988, the grievor had also not only verbally requested that he be transferred to virtually any other department in the St. John's Mail Processing Plant, but had filed eight formal "Request For Transfer" forms because he too, as he testified, was concerned with what was going on in City Parcel Post Sortation.

Counsel for the Union objected to David Francis' testimony based on articles 10.01 and 10.02 of the Collective Agreement. I admitted his evidence subject to that objection, to be dealt with in the context of my conclusions with respect to the Union's earlier objection based on article 10.02. It suffices to say at this point that to the extent that Mr. Francis' evidence goes to prove grounds of discipline or discharge properly before me I have taken account of it and will set it out here. I have accepted that the facts to which he testified did not come to the attention of the Employer until he told Mr. Crook of it on August 16. I have also accepted that insofar as Mr. Francis' evidence had to be the subject of a report in accordance with article 10.02(b) that requirement was met by the fact that Mr. Francis' evidence was given before me within ten days of the Employer becoming aware of it. Had I considered it necessary, the Employer stood ready to place a formal report of Mr Francis' evidence on the grievor's file and send him a copy. I return below to this aspect of the application of article 10.02.

I now turn to a consideration of the evidence on the merits of the Employer's case against the grievor.

David Francis was the first witness called by the Employer in this aspect of the case. Mr. Francis is now a letter carrier with the Corporation but in November and December, 1987 he worked as a casual in the Parcel Sortation area. I found him to be a wholly credible witness, put into an extremely difficult situation by being forced by the Employer to testify. As I have already mentioned, during the period covered by his testimony he worked for the most part with the grievor and Roger Vincent, because Wayne Ghaney was off sick. For Mr. Francis' last week in City Parcel Post Ghaney was there, because he had returned to light duties, so the four of them worked together. David Francis testified to three specific incidents.

The first, he recalled, occurred while he was working on the catwalk with the grievor and Roger Vincent, with Vincent on his right and the grievor on his left. He saw Vincent rip open a package, but he could not say whether the grievor saw Vincent do so. He testified that Vincent then took some photographs out of the package, looked at them for a second or two and then passed them across in front of him to show the grievor. Francis testified that when that happened he immediately went downstairs and started putting parcels on the belt, "just to get out of there". He could not testify to the grievor's reaction upon being shown the pictures.

The next incident occurred when Francis, the grievor and Vincent were "tying out" from the binnies at the bottom of the sortation chutes. Francis said that he saw Vincent open a parcel addressed to Sweatens, a clothing store in St. John's. Again, he did not know if the grievor saw Vincent open the parcel. However, he was sure the grievor did see Vincent take a white blouse out of the parcel, hold it up and look at it and then either the grievor or Vincent said "this would look good on . . .", naming somebody. Mr. Francis could not remember whether the comment came from the grievor or Roger Vincent, and once again he "got out of there" as quickly as possible. Mr. Francis did not know what happened to the blouse.

The third incident occurred when just the grievor and Mr. Francis were working on the catwalk together. Francis testified that an unaddressed Playgirl magazine came up the belt. He testified that the grievor opened the magazine momentarily and threw it down the "station box" chute. Later when they were tying out the parcels from the binnies the Playgirl magazine showed up. Mr. Francis testified that the grievor took the magazine and started to walk toward Station A, that is the area where members of the public had lock boxes, and where some employees of the Post Office had lock boxes in their private capacity. The grievor returned shortly and said that he had put the magazine in somebody's lock box. Mr. Francis testified that he could not remember the name but recognized her as being a deaf and dumb girl with

short blond hair who worked in the Postal Plant. He said the grievor treated it as a joke.

There was a good deal of additional testimony, by the grievor, Roger Vincent and others bearing on these three incidents. I will refer to it in the context of my findings of fact.

With respect to the photographs I find that on at least one occasion Roger Vincent did show the grievor photographs taken from a package in the mail, but I am not satisfied that the grievor knew Vincent had opened the package. He may well have assumed that the package was damaged and that Vincent was looking at it in the process of putting it back together. In his testimony the grievor said that he did not recall the incident with the photographs testified to by Mr. Francis. However he could recall three to five times in 1987 when Wayne Ghaney had opened parcels, including one with photos in it. The grievor said that he wanted to have as little as possible to do with such activity on Ghaney's part. He also testified that Roger Vincent had done that kind of thing on occasion, including once when he had opened a package of photographs with his hand, looked at a couple of them and taped them back up. He denied ever encouraging such activity, suggesting it was okay or ever taking pictures from Vincent to look at. He acknowledged, however, that if Vincent had held out his hand with pictures in it for him to look at he might well have glanced at them. Roger Vincent testified he could not recall the specific incident testified to by David Francis either, although he had

opened packages containing photographs which he might have held to the grievor. He denied ever asking the grievor to in any way help him or act as a look-out when he was engaged in such activities. Wayne Ghaney testified that he could recall looking at photographs but not ever opening a package to do so. He could not recall ever showing photographs to the grievor.

With respect to the Sweatens box I find that Roger Vincent opened such a box and took out a blouse which he displayed to David Francis and the grievor, which the grievor probably saw. The grievor testified that he did not recall the incident. He said such boxes could get damaged in the chute and displaying the blouse and making a comment was the kind of thing Roger Vincent might well have done in the process of repairing the parcel. Mr. Vincent testified that he could not remember the incident with the blouse from a Sweatens box, but he said that it was common for such parcels to break open and he had on occasion horsed around with the contents. He recalled specifically a negligee. He said that the grievor might have observed him and might have laughed. His practice then was always then to repair the parcel, probably by encasing it in a plastic bag.

I note that the grievor did not report Roger Vincent's "displaying" either the photographs or the blouse from the Sweatens box nor, for that matter, other incidents of improper dealing with the mail by Ghaney and Vincent to which he adverted in his own testimony. Specifically the grievor recalled Mr. Ghaney opening

a parcel with a cassette tape in it, which he simply repaired and sent on its way. He also recalled Ghaney looking at magazines on the catwalk, and Roger Vincent himself said that he had opened packages of magazines on the catwalk. The grievor testified that, as well, he had seen Mr. Vincent looking at pictures in a calendar, of the sort that comes in a cylinder. He said he was not sure whether the calendar had partly fallen out of the cylinder or had been taken out by Mr. Vincent. There were also a couple of incidents when Wayne Ghaney punched or kicked parcels, according to his own evidence, and the grievor testified that he observed him doing so. None of these improper dealings with the mail were reported by the grievor.

The incident testified to by David Francis about which there was the greatest amount of additional testimony was the Playgirl magazine incident. The overall effect of this testimony is that I am not satisfied on the balance of probabilities that Mr. Francis' recollection is correct. The grievor denied ever having taken the magazine or anything else and put it in somebody else's Station A lock box. More important, counsel for the union called as a witness Joan Luedee, a deaf and dumb girl with short blond hair who worked on the same shift as the grievor, Ghaney and Vincent. She testified through an interpreter that in the fall of 1987, earlier than November, she had had a joking exchange with Roger Vincent which resulted in a magazine with pictures of naked men in it being put in her lock box in Station A. Ms. Luedee was

certain, from writing in the magazine and a subsequent "conversation" with Mr. Vincent, that he was the one who had put the magazine in her box, which was immediately above his in Station A. She said that she had, in effect, asked him to give her the magazine. Ms. Luedee testified that she had never had any such dealings with the grievor. She also testified that there was one other blond deaf and dumb woman working in the postal plant but that she did not have a lock box. Taking all of this testimony into account, I have concluded that it is quite likely that David Francis, or Joan Luedee was confused as to the timing of the Playgirl incident, and that it involved Roger Vincent, not the grievor. That likelihood has induced sufficient uncertainty in my mind that I am unable to conclude that, on the balance of probabilities, the grievor took a Playgirl magazine from the mail and put it in another employee's lock box.

There was a great deal of evidence about magazines in the St. John's mail processing plant generally and in particular on the catwalk where the grievor worked. The fact seems to have been that as a regular practice the employees of H. H. Marshall, the wholesale magazine distributor, gave out what are commonly referred to as "skin" magazines to postal employees on the loading dock. These magazines were ones that had not been sold and were being returned to the distributor. Normally they had their front covers torn off, but apparently not always. In any event, it is clear that at the time in question these magazines were circulated widely in the

Plant, and some people may have brought their own magazines into the Plant. Quite frequently, as a joke, people would send skin magazines up the conveyor belt to the catwalk for the amusement of employees working on sortation.

The fact that magazines of this sort were around all the time tends to confuse the picture with respect to inappropriate handling of magazines in the mail by Ghaney, Vincent and the grievor. Occasionally magazines would come out of their individual brown wrappers or a "two pounder" of magazines bound together would break apart, so there were different possible explanations for the appearance on the sortation table of unaddressed magazines. The point is that on the evidence as a whole I am not satisfied that the grievor has been shown to have dealt inappropriately with magazines that were mailed.

The next witness as called by the Employer after David Francis was Michelle Caines. Ms. Caines simply testified to the fact that in January of 1988 she was in residence at Memorial University. She contacted her mother in Port-Au-Choix to send her skates and other things for winter carnival. Her mother advised her that the box had been sent on time but it did not arrive until March, in a plastic bag. It obviously had been damaged. Specifically, Ms. Caines testified that her mother had sent her three bags of candy and two cans of Vienna sausage. When she received her parcel there were two bags of candy, with one slightly opened, one can of Vienna sausage and the empty tin and lid for the other. Among other

items, her parcel included a pair of underwear. Apart from David Francis' evidence, the employer's case was largely based on the testimony of the grievor himself, Roger Vincent and Wayne Ghaney about inappropriate dealing by the grievor with the Caines parcel.

None of the witnesses testified to the date when items were taken from the Caines parcel. In response to several questions by counsel for the Employer both Vincent and Ghaney replied that they could not remember certain aspects of the incident other than "from the videotape". Counsel for the Union, Ms. Turner, objected to that sort of testimony. I sustained her objection on the basis that this was evidence gathered in violation of article 41.02(b) in that it constituted using the closed circuit television system at least indirectly. By article 41.02(b) such evidence is inadmissible. From their testimony, however, there is no doubt that the Caines parcel was not opened by the grievor but was opened by Wayne Ghaney. After opening the parcel and going through it Ghaney horsed around with the underwear making obscene comments and gestures.

By his own testimony, the grievor knew that Ghaney had taken the underwear from the Caines parcel. The grievor testified that he had remarked to Roger Vincent that Ghaney had a wierd sense of humour. Apparently the parcel was then put on the floor at the far end of the catwalk from the stairway entrance, on the side away from the conveyor belt, for later repair. That would have placed it approximately behind and slightly to Wayne Ghaney's right. The

grievor was standing next to Ghaney, and Vincent was on the grievor's left, closest to the stairway entrance to the catwalk area.

The grievor's testimony was that in the fifteen minutes after Ghaney had put on this display with the panties he offered the grievor some Vienna sausage, of which the grievor ate two. The grievor could not recall, he said, whether the can had been passed to him or whether he was passed individual sausages. The grievor denied any suggestion that he saw the sausages being taken from the Caines parcel or knew that was where they had come from. He testified that it was common for him and his fellow employees to eat lunch on the catwalk. There was a good deal of confirmatory evidence to that effect and I find such to have been the case. On the same basis I find that Wayne Ghaney was a frequent snacker between meals, although food and beverages were not officially allowed on the work place floor. He testified that Vienna sausages were a standard lunch fare for him, noting that he used to go hunting with the grievor and they often took Vienna sausages with them.

Ghaney further testified that the grievor could not have seen him take the sausages from the Caines package and that he had just said "want a weiner?", and that was it. Roger Vincent testified that he was not clear whether the Vienna sausage had come from the package or was simply something that Ghaney or the grievor had in

the area. He testified that he had seen Ghaney eat such sausages on the catwalk on many occasions.

Of course, there is no good reason for me to treat any of this as believable testimony. Neither Ghaney nor Vincent appeared to be a credible witness. Indeed, Ghaney did not even try to make a very believable pretence when he said he could not remember the incident in question. Vincent, I am more satisfied, was having some difficulty in sorting out what he remembered from the videotape from what he could remember of the actual occurrences. Based on demeanour, the grievor was the most credible witness of the three, and of course his self serving evidence cannot be given much weight. The difficulty, however, from the Employer's point of view is that there is no basis upon which I can conclude that Vienna sausages like those from the Caines package were other than a fairly common snack food in St. John's and it is not unlikely that Wayne Ghaney had offered them to his fellow workers on the catwalk on previous occasions. I have, therefore, been unable to conclude, on the balance of probabilities, bearing in mind the significance of the finding, that the grievor knowingly ate Vienna sausages stolen by Ghaney from the Caines parcel.

What I know from the evidence is that the grievor was aware that Ghaney had opened a parcel with female underwear in it and then placed the parcel on the floor for subsequent repair. I am satisfied that the layout of the workplace and the nature of this location was such that Ghaney could very probably have taken the

sausage out of the package without the grievor noticing him do it, even though he was working beside him.

Subsequently, Ghaney offered the grievor and Roger Vincent candy, Purity Candy Kisses to be specific. According to the evidence, the grievor refused the offer and carried on with his work. There is no serious suggestion that the grievor ate any of the candy but there is the question of whether he saw Ghaney eat candy taken from the Caines package. On this the evidence is the same as it is with respect to the Vienna sausage and I must make the same finding, that Ghaney could have taken the candy from the parcel without the grievor noticing him do it. I think, though, that with two items of food coming in fairly quick succession after he knew Ghaney had opened the parcel containing the panties the grievor must have become highly suspicious of the source of the food. Perhaps that is why he refused the candy.

Wayne Ghaney testified that he remembered, towards the end of the work day upon which the Caines parcel had been opened, going to the grievor, giving him a bag of candy and telling him, in effect, to put it in a damaged mail area. He said he thought he laid it on a parcel that the grievor had in his arms and said something like "here, take those down".

The grievor testified that he did not recall Ghaney giving him the candy or walking down with it, although he did recall Ghaney having testified at the criminal trial in the same terms he did in hearing before me. The grievor testified that he had no

knowledge that Ghaney would subsequently take the candy from the Employer's premises nor did he in any way assist or approve of that. In his initial testimony under direct examination on this point the grievor testified that he had started down the stairs and part way down Ghaney had handed him the candy and asked him to take it down, and that he, Ghaney, had then gone back up to the catwalk for more damaged mail. It became clear even in his direct testimony that when the grievor first testified to those actions he was doing so from having seen the videotape, not from memory. In answer to a question by counsel for the Employer as to whether a parcel was concealed by his jacket as the grievor went down the stairs he answered "no", and there was no further evidence on that point.

With respect to the incident of the candy being brought down from the catwalk, there is simply no evidence of any wrongdoing by the grievor. Indeed, I do not recall any evidence before me of what eventually happened to the package of candy in question although from one of counsel's questions I may infer that Ghaney took it from the workplace.

Before leaving these facts, I should note that before giving his testimony Roger Vincent invoked the protection of the Canada Evidence Act, apparently because he feared that on the basis of David Francis' evidence there might be a further criminal investigation.

THE ISSUES:

[1] I will deal first with the effect of article 10.02 in this case. After outlining my general understanding of the effect in proceedings such as this of article 10.02, together with article 10.01, I will answer three questions: (a) Can David Francis' evidence properly be taken into account; (b) Did the Employer meet the time requirements of article 10.02(b) in placing upon the grievor's personal file the various documents in evidence here, up to and including the letter of discharge of February 8, 1988; (c) Upon what grounds can the grievor be said to have been discharged, and how does that effect the relevance in this arbitration of evidence showing that he knew of, and failed to report, damage to, or theft from, the mails by his fellow workers.

[2] I will then consider the merits of the case. Does the evidence relevant to the grounds of discharge properly under consideration here establish cause for some discipline? In this connection I must consider the burden of proof in a case such as this.

[3] If the answer to the second question is "yes", does the evidence properly before me justify the discharge of the grievor?

[4] If the answer to the third question is "no", what is the appropriate discipline?

[5] If discharge was not justified, is it nevertheless appropriate for me to refuse to order the grievor reinstated?

DECISION

[1] The relevant parts of article 10.02 provide:

> **10.02 Personal File**
> (a) The Corporation agrees that there shall be only one personal file for each employee and that no report relating to the employee's conduct or performance may be used against him in the grievance procedure nor at arbitration unless such report is part of the said file.
>
> (b) No report may be placed in the file or constitute a part thereof unless a copy of the said report is sent to the employee within ten (10) days after the date of the employee's alleged infraction, or of its coming to the attention of the Corporation, or of the Corporation's alleged source of dissatisfaction with him.

In my opinion what I said about the application of these provisions in my award in an arbitration between these parties in the matter of Jean-Paul LeBlanc (May 1, 1990), C.U.P.W. Grievance No. 0788800155, applies here:

> These provisions have been so frequently considered by arbitrators under this Collective Agreement that it should not be necessary to say any original words at all about them. However, I must say explicitly that I take the thrust of those awards to be that when the Collective Agreement states that "no report relating to an employee's conduct or performance may be used against him", it means that no conduct or performance by an employee may

> be used against him or her at arbitration unless that conduct or performance has been made the subject of a report which is properly part of the Employee's personal file. That interpretation is consistent with the practice of the parties in relation not only to article 10.02(a) and (b) also in relation to article 10.02(c) which requires that unfavourable reports be withdrawn after a period of twelve months. I have never doubted that under this Collective Agreement it would be improper to support discipline by evidence, written or in the form of oral testimony, of infractions not mentioned in reports properly on a grievor's personal file. To do so would be to defeat the obvious intent of the parties. This was summed up by arbitrator Thistle in his unreported decision between these parties in Brewer (May 25, 1983) C.U.P.W. No. A-9-GG-360 C.P.C. Arbitration No. 83-1-3-609, where he said, at p. 20;
>
> > The grounds referred to in [a disciplinary notice in accordance with article 10.01(a)] must be such as are referred to in reports that are properly part of the employee's personal file.
>
> In the preceding pages arbitrator Thistle refers to several arbitration awards which led him to this conclusion, notably the unreported but much referred to award of arbitrator Mitchell in Williams (File No. 166-2-5869) in which that arbitrator stated at p. 21
>
> > . . . The essence of article 10.02 (b) in the Collective Agreement is to oblige the employer to disclose to the employee by means of a copy sent to him within a stipulated time the contents of each and every report placed in his file. The employee need face no surprises regarding any alleged misconduct or source of dissatisfaction with him. [Emphasis added]

As is made clear by my editorial addition to the brief quote in LeBlanc from arbitrator Thistle's award in Brewer, the effect

that has been given to article 10.02(a) and (b) must be understood in the context of article 10.01(a) and (b), which provide;

> **10.01 Just Cause and Burden of Proof**
>
> (a) No disciplinary measure in the form of a notice of discipline, suspensions or discharge or in any other form shall be imposed on any employee without just, reasonable and sufficient cause and without his receiving beforehand or at the same time a written notice showing the grounds on which a disciplinary measure is imposed.
>
> (b) In any arbitration relating to a disciplinary measure, the burden of proof shall rest with the Corporation and such proof shall be confined to the grounds mentioned in the notice referred to in paragraph (a) above.

Two further points about articles 10.01(a) and (b) and 10.02(a) and (b) must be made; points about what they do not require of the Employer. First, while it is required that the infractions with which a grievor is charged must be mentioned in reports properly on his or her personal file, all evidence of those infractions need not be on the grievor's personal file. See my award between these same parties in Whittle (April 29, 1988) C.U.P.W. Grievance No. 126-875-00514; C.P.C. Arbitration No. 87-13-9912 at pp. 9ff. quoting an award of arbitrator Bird between these parties in Williams, No. 5 (August 21, 1987) C.U.P.W. Grievance No. W-350-H-590; C.P.C. Arbitration No. 86-1-3-4508 and the cases cited there, in particular the award of arbitrator Swan in Canada Post Corporation and C.U.P.W. (Marini) (1987) 26 L.A.C. (3d) 403 at p. 425. Second, while article 10.01(a) requires notice "showing the

grounds upon which a disciplinary measure is imposed" and article 10.01(b) confines the Employer's proof to "the grounds mentioned in the notice", those provisions address the grounds of "discipline, suspension or discharge", not the evidence supporting such grounds.

Combining these elements may be difficult. The Employer is only allowed to justify discipline on the grounds stated in a notice given in accordance with 10.01(a), and may only do so by proving infractions which have been properly placed on the employee's file in accordance with article 10.02(b), that is within ten days after date of the alleged infraction or of its coming to the attention of the Corporation. On the other hand, in my view the grounds set out in the notice under article 10.01 need not specify every infraction an employer may bring forward to prove or establish those grounds, provided the Employer has met the requirements of article 10.02(b) in putting a report of those infractions on the grievor's personal file. Furthermore, once an infraction has been included in a report on the grievor's personal file the Employer may tender whatever evidence it has with respect to the occurrence of that particular infraction.

It is not possible to avoid having to make judgements in difficult cases. For example, it may have to be decided whether an infraction is in fact a new and separate "ground" for discipline, which must be specified in the article 10.01 notice. It may have to be decided whether what the Employer says is merely evidence of

an infraction which is already the subject of a report on the grievor's personal file under article 10.02(b) is better characterized as showing a new or different infraction, which should therefore be itself the subject of a report properly on the grievor's personal file. This, on my reading, was what arbitrator Outhouse found to be the case in his award between these parties in Paul Adams (March 20, 1990), C.U.P.W. Nos. 096-87-0057, 00228, 00231; 096-88-00124 and 00243; C.P.C. Arbitration No. 88-1-3-04625, at p. 13.

(a) The union's objection to the testimony of David Francis.

Applying what I have said above, I have concluded that David Francis' testimony was properly admitted in evidence. As I explained in outlining that testimony, I am proceeding on the basis that a report of the infractions to which Francis testified were effectively put on the grievor's personal file by virtue of Francis' testimony having been given within ten days of his evidence having come to the attention of the Corporation. To the extent that Francis' testimony constituted evidence of infractions within the grounds mentioned in the Employer's notice under article 10.01(a) the evidence in Mr. Francis' testimony was relevant. In paragraph (c) below I discuss what I find those grounds to have been.

(b) What reports of infractions were properly sent to the grievor and placed on his personal file in accordance with article 10.02 (b)?

The first document sent to the grievor and placed on his personal file in this matter was the January 27 letter to him from Andy O'Brien, the Plant Manager, advising him that he was indefinitely suspended from duty without pay, effective 1400 hrs. January 27, when he was arrested. Mr. O'Brien and Mr. Ron Fleming, Chief of Security and Investigation, both testified that Mr. O'Brien had no knowledge of the grievor's criminal activities or of his "damaging, tampering and theft of mail" until that day. Further, Mr. O'Brien testified that he knew no details until just before he wrote the grievor's discharge letter of February 8. The first aspect of this is credible in light of Mr. Fleming's status as a member of Canada Post's Security and Investigations Branch, reporting directly to Mr. Whitsun in Ottawa. Although he worked with the police, as arbitrator Swan stated in Marini (cited above) at pp. 421-2, police knowledge should not be attributed to the Employer. However, Mr. Fleming's knowledge must be attributed to the Employer, even if he did not reveal it to Mr. O'Brien. The Employer cannot compartmentalize itself to circumvent the demands of article 10.02(b) of the Collective Agreement.

The question then, to once again paraphrase arbitrator Swan in Marini, at pp. 422-3, is when the Employer was reasonably able

to proceed with disciplinary action. It seems clear that that date was January 27, when the grievor was arrested. However, the Employer then proceeded only with the indefinite suspension, and did so on the explicit basis that there needed to be further investigation. I have concluded, therefore, that the question should be, when did sufficient evidence come to the attention of the Employer to enable it to proceed with the discharge, which is the discipline in question here.

As it turned out, the disciplinary interview on February 5th was of no assistance, although the Employer might quite reasonably have expected that it would be useful in deciding whether to discharge the grievor. Following that, and before writing the letter of February 8, Mr. O'Brien discussed the grievor's involvement with items taken from the Caines package with Mr. Fleming, as well as with Labour Relations. At that point, he testified, a decision was made to discharge the grievor, on the basis that he had been as involved as Ghaney and Vincent. The difficulty with this, for the Employer, is that "the Corporation" learned nothing after January 27 that Mr. Fleming did not know on that date. Thus, twelve days having lapsed between January 27 and February 8, the letter of February 8th cannot constitute a "report" on the grievor's file of infractions that occurred on January 27 or earlier.

Counsel for the Employer submitted that the reference to "ten (10) days" in article 10.02(b) is to working days. Counsel for

the Union, quite correctly pointed out that the established view of arbitrators under this Collective Agreement is that the reference is to calendar days. I refer to my award between these parties in Logue (April 3, 1986) CUPW No. A-24-14-120; CPC No. 85-1-3-5345 at pp. 10-13.

As arbitrator Thistle pointed out in Brewer (cited above) at p. 20, there is no defined time limit within which a "discipline notice" in accordance with article 10.01(a) must be issued. The Employer has a reasonable time to decide whether or not to impose discipline. In my view the letter of December 8 was issued within a reasonable time and constitutes a proper notice under article 10.01, even though the grounds it sets out cannot be established by reliance on infractions not referred to on the grievor's personal file. To avoid confusion, let me make it clear that what I am saying is that the letter of December 8 could have two functions; as a "notice of discipline" under article 10.01(a) and as a "report" under article 10.02. It was sent in time to fulfill the first function but not in time to fulfill the second. The effect is that the Employer cannot rely on infractions other than "damaging, tampering and theft of mail" in establishing the grounds set out in the discharge letter of February 8. The Employer can rely on those infractions because they were referred to in the letter imposing the indefinite suspension of January 27, which constitutes a report and was put on the grievor's file in time. The Employer's "Disciplinary Interview, Narrative Report" of

February 5, which was placed on the grievor's file in time, slightly expands the statement of the infractions, in that Mr. O'Brien told the grievor and his lawyer that the Employer had been advised that the grievor was observed "intentionally damaging parcels, tampering with and opening parcels and other mail, contents were extracted, looked at, read in certain cases, damaged and items opened and contents stolen". I need not decide whether the notice of disciplinary interview also constitutes a timely report, because it simply reiterates the infractions set out in the letter of January 27.

The major effect of the letter of February 8 not having been properly placed on the grievor's file in time is that there cannot be said to be anything on that file referring generally to violations of the Canada Post Corporation Act or to "criminal offences".

(c) Upon what grounds can the grievor be proved to have been properly discharged?

As I have already said, in my view the letter of February 8, 1988, while it was not properly placed on the grievor's personal file within the ten days required, did meet the requirements of article 10.01 as a written notice showing the grounds upon which a disciplinary measure was imposed. Paragraph 2 of that letter states that during a period of investigation the grievor was

observed "intentionally damaging parcels, tampering with them and theft of items from the mail". In paragraphs 1 and 4 there are references to criminal activities and breaches of the Canada Post Corporation Act. However, as I have already said in paragraph (b) above, there being no report of any such infractions on the grievor's file the Employer is confined to making its case for discipline and discharge by proving that the grievor is guilty of "intentionally damaging parcels, tampering with and theft of items from the mail". There is no question that the grievor knew that to do so constituted grave misconduct.

In this context it is appropriate to refer to the document headed "Interference and Tampering With Mail Forbidden" which the grievor signed on November 29, 1977 when he joined the Post Office; parts of that document are set out above. What is of critical importance at this juncture is to point out that the grievor was dismissed for "damaging . . ., tampering . . . and theft . . .", not for failing to report such activities or for allowing them to go on. Counsel for the Employer referred to the document in question partially for the fact that it brings to the attention of employees that every person who "suffers to be unlawfully opened, kept or secreted or detained any article of mail is guilty of an indictable offence". If I understood his argument, it was that by referring in the letter of February 8 to violations of the Canada Post Corporation Act and criminal offences the Employer had incorporated this sort of activity by reference into the misconduct

with which the grievor was charged. I have grave doubts that the language of the letter of February 8 could be given that effect, but in any event the fact that that letter was not properly on the grievor's file in time means that these are infractions which cannot be used to prove the charges against him, even if the grounds could be said to have been set out in the notice of discipline, that is in the letter of February 8.

[2] Does the evidence against the grievor on the grounds properly before me establish "just, reasonable and sufficient cause for discipline", as required by Article 10.01(a) of the Collective Agreement?

For reasons I have just given, the grounds properly before me for consideration are "intentionally damaging parcels, tampering with and theft of items of mail". Reports properly on the grievor's file disclose allegations that he did this by tampering with and opening parcels and other mail, extracting the contents, looking at and reading in certain cases, damaging items and stealing the contents. The evidence properly before me that he did such things consists of David Francis' testimony with respect to photographs passed to the grievor by Roger Vincent, Roger Vincent's displaying of the blouse from the Sweaten's box and the "Playgirl" incident. It also consists of the testimony of the grievor, Vincent and Ghaney about the Caines parcel and the grievor's own testimony that he had observed Wayne Ghaney opening

parcels three to five times, including magazines, photographs and a calendar.

Counsel for the Employer suggested that in assessing the evidence on these matters I should apply the civil burden of proof, not the criminal or some intermediate burden of proof. In support of this he cited the decision of Nathanson, J. in Halifax Longshoremen's Association, Local 269 v. Maritime Employers Association (1988), 89 N.S.R. (2d) 135 in which His Lordship, in an oral decision, refused to quash an award of arbitrator Peter Darby in which he held that even where criminal activity was involved the relevant burden of proof remains proof on a balance of probabilities. In that case Professor Darby went on to say that he found the evidence "clear and cogent" and "convincing". Like Professor Darby, I am satisfied that the civil burden of proof applies. I have said in the past that because of the seriousness of discharge an arbitrator should require "clear and convincing proof of the facts alleged by the Employer to justify the discharge, but this is not a criminal burden of proof". (See Air Canada (1978) 117 L.A.C. (2d) 337)

Applying the civil standard to the evidence before me here, I have concluded the evidence properly put forward by the Employer does not prove that the grievor was guilty of "intentionally damaging parcels, tampering with or theft of items from the mail". As I have already suggested in my review of David Francis' testimony, I am not satisfied that the grievor was involved in the

"Playgirl" incident testified to by Mr. Francis. I am not satisfied with respect to the package of photographs which Mr. Francis saw Roger Vincent open that the grievor did more than glance at the photographs when they were held out to him by Vincent, and I am not satisfied with respect to the Sweaten's parcel that he did more than look at the blouse which Vincent had taken out of the parcel. Looking at the photographs and the blouse did not constitute damaging, tampering or theft.

Similarly with respect to the Caines parcel, I am not satisfied that the grievor did more than observe Wayne Ghaney horsing around with the underwear. Again, that did not constitute damaging, tampering or theft.

The grievor did eat Vienna sausages which I find came from Ms. Caines' package. As I have stated above, however, I am unable to find that he did so knowing that they were "mail", in that they came from the package with which Ghaney had been tampering. I suppose the grievor did, in fact, damage "mail", but he is charged with having done so intentionally, and certainly unintentional damage would not invite discipline unless, at a minimum, negligence had been established.

With respect to the candy from the Caines package it was not established that the grievor did any more than observe the candy. Even if he had reason to suspect that it had come from the package, since he did not touch the candy, the grievor cannot be found guilty in that context of "damaging, tampering or theft". With

respect to carrying the candy down from the catwalk, there is no evidence at all that he did other than accept the package from Wayne Ghaney and carry it down to the repair table, which was an entirely appropriate thing for him to do.

In sum, the charges properly before me, "damaging, tampering and theft of mail" as set out in the "Notice of Disciplinary Interview" on February 2nd and Letter of Indefinite Suspension of January 27, have not been proven. Nor have the specific infractions mentioned in the "Disciplinary Interview Narrative Report" of February 5, 1988, "opening parcels and other, contents were extracted, looked at, read in certain cases, damaged, and items opened", been proven, with the possible exception that contents were "looked at". However, "looking at" does not constitute "damaging, tampering or theft".

I need not address the questions of whether the grievor was "involved in criminal activities under the Canada Postal Corporation Act" or "major acts of misconduct in violation of the Canada Post Corporation Act, which is also a criminal offence", other than by "damaging, tampering and theft" because no report of such infractions was sent to the grievor within ten days after the alleged infraction or its coming to the attention of the Corporation. Similarly, I need not be concerned with whether the grievor "did . . . knowingly . . . permit to be opened kept, delayed or detained mail" or "suffer[ed] to be unlawfully opened, kept, secreted or detained articles of mail" because he was never given

written notice setting those out as grounds for his discipline in accordance with Article 10.01(a). Article 10.01(b) is quite explicit in providing that in discharging its burden of proof the Employer "shall be confined to the grounds mentioned in the notice referred to in paragraph (a) . . .".

Based on these findings, I must conclude that the Employer has not established grounds for any discipline.

(3) It follows, naturally, that the evidence cannot be held to justify the grievor's discharge.

(4) It also follows that I need not consider what discipline is appropriate.

(5) Is it Appropriate Not to Reinstate the Grievor?

Counsel for the Employer submitted in argument that whether or not I concluded that there was just cause for any discipline I should not reinstate the grievor. If I found there to have been no just cause for discharge, counsel submitted, I should order the grievor fully compensated by the payment of money damages but should not order him reinstated. The grievor, he submitted, does not enjoy the trust of the Employer and never will. The grievor, he said, has worked in the past in a situation where trust was

necessary because of the near-impossibility of surveillance in the handling of the public's property. In effect, counsel for the Employer has submitted that if the facts disclose that although the grievor did not himself damage, tamper with or steal from the mails he clearly stood by and permitted others to do so and therefore the trust necessary with his viable employment upon reinstatement could not exist.

The Employer relied particularly on the decisions of arbitrator Adams in Extendicare Ltd. (St. Catherines) (1981), 3 L.A.C. (3d) 243 and Arbitrator Brown in Lilicups Ltd. (1981) 3 L.A.C. (3d) 6. In both those awards the arbitrators found that there was no just cause for discharge but refused reinstatement, substituting money damages. Counsel for the Employer also relied on my award in Corporation of the City of Toronto (1985), 18 L.A.C. (3d) 187 in which I rejected the argument that, as an arbitrator under the Ontario Labour Relations Act in that case, I had no jurisdiction to award damages in lieu of reinstatement unless there was "some" cause for discipline. I did decide in the circumstances of that case to award a reinstatement. Counsel also relied on the award of arbitrator Teplitsky between these parties in Varma (August 2, 1990) C.U.P. Nos. 602-88 etc.; C.P.C. arbitration Nos. 288973Y etc. Evidently arbitrator Teplitsky was of the view that he had the power to order damages without reinstating the grievor, but there were no written reasons in his award so it is of no real assistance here.

In my opinion, even if I have jurisdiction under this collective agreement and the Canada Labour Code to order the payment of damages in lieu of reinstatement where the Employer has not proved just cause for discharge or any discipline, this would not be an appropriate case in which to exercise that jurisdiction. I will not, therefore, decide that question here, as I did in the City of Toronto matter, but will confine myself to giving reasons why I think it would not be appropriate to deny reinstatement here, assuming without deciding that the power to do so is within my jurisdiction.

Article 10.01(a) and (b) of this Collective Agreement put strict limits upon the proof the Employer may advance to justify any disciplinary measure imposed on any employee. Article 10.02 severely limits the infractions that may be used against an employee in the grievance procedure or in arbitration. Both provisions are concerned with what evidence an arbitrator may properly consider. Very often it is much more practical to allow evidence to be entered subject to the Union's objection than it is to attempt to decide in advance whether it is admissible. That is what was done in this case. All of the evidence going to show that the grievor "suffered" or "permitted" his workmates to "damage, tamper or steal" was admitted subject to the Union's objection. The effect of article 10.02 and 10.01 was to preclude me from considering certain documents and to narrow the charges properly before me. In my view it would be quite improper to have

admitted that evidence, subject to objection, dealt with it in argument at the end of the case, and then rely on the very evidence I concluded was rendered inadmissible or irrelevant by article 10.02 or 10.01 to decide that the grievor could not be reinstated because he had destroyed the basis of the Employer's trust in him. Arguably, counsel for the Employer could have submitted that evidence which went beyond what was relevant to the charges was properly before me as relevant to the question of trust, which he would raise in his final argument, and was therefore admissible. (The same argument could not be made with respect to matters precluded by article 10.02) Even if that argument has some validity, it seems doubtful that in agreeing to article 10.01 the parties can be taken to have contemplated proof of grounds not mentioned in the disciplinary notice as a basis for concluding that the relationship of trust required by the Employer could not be reestablished. That simply looks very much like admitting in a different guise evidence that has been specifically precluded by the clear words of the article.

On a different and less technical plane; however broad my powers may be under article 9.39 of this Collective Agreement, I am reluctant to deny employment to a grievor who has not been shown on proper proof to have been discharged or even disciplined for any just cause. I agree with arbitrator McDowell in Tenant Hot Line and Peterson Gittens (1983) 10 L.A.C. (3d) 130 at p. 139 that employees under this collective agreement "have a legitimate

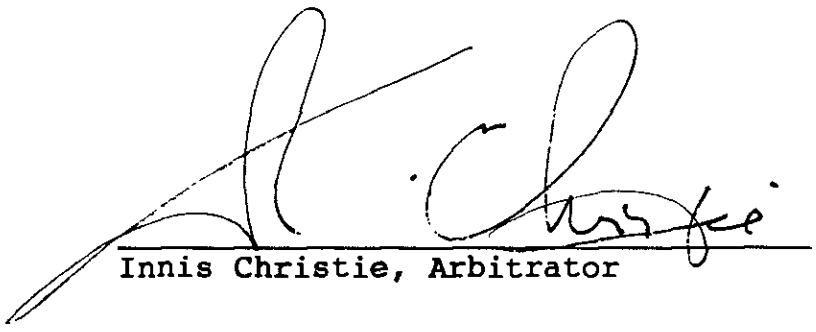
expectation and a legal right to tenure of employment, unless there are justifiable grounds for termination". As the board said in Kingsway Transports Ltd. (1982) 4 L.A.C. (3d) 232 at p. 240 "arbitrators should be loathe to deny any employee reinstatement where the penalty of discharge has been found excessive, on the basis of conduct which predates the immediate incident, and which could have been made the subject matter of a discipline but was not". If the Employer here was to get rid of the grievor because the relationship of trust was destroyed it had to make that a ground of discharge and place properly on his file reports of incidents supporting that ground, and then prove them by proper evidence. As arbitrator McDowell said in Tenant Hotline (cited above) at p. 146:

> It was said by the employer that it has lost confidence in the grievors, and that such confidence cannot now be restored. But a similar argument can be made in every dismissal case. Obviously an employer who dismisses an employee does so because he concludes that the employee can no longer function in a proper employment relationship.

CONCLUSION AND ORDER

For all of the reasons given above I have concluded that the Employer has not proved the grievor was disciplined with just, reasonable or sufficient cause on the grounds mentioned in the Notice of Discharge. I reject the submission by the Employer that the grievor should nevertheless not be reinstated but should be

instead compensated by the payment of money damages. Therefore I allow the grievance and order that the grievor, Thomas Burke, be granted full redress and reinstated in the position he held with Canada Post Corporation at the date of his discharge, and compensated for all lost rights, benefits and earnings and that all reports, letters and documents relating to the charges against him be removed from his personal file. As agreed by the parties at the outset of the hearing, I will remain seized of this matter and will reconvene the hearing at the request of either of them to deal with any matters in dispute arising from the implementation of this order, including the quantification of compensation to be paid to the grievor.



Innis Christie, Arbitrator